Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-346

In the Matter of LITTLE SWITZERLAND BREWING COMPANY, Debtor, In Chapter XI Proceedings:

CHARLES E. OXLEY and FRED J. ELLISON,

Petitioners,

v.

LITTLE SWITZERLAND BREWING COMPANY, an extinct corporation, and JAMES W. ST. CLAIR, As Special Counsel,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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N O T I C E

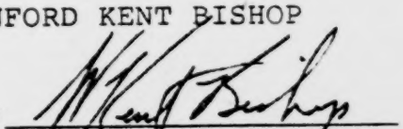
O F

S U B S T I T U T I O N

After this Petition for Writ of Certiorari had been prepared, but before filing, Fred J. Ellison died August 27, 1978 in the State of West Virginia.

His widow and personal representative Catherine E. Ellison, has asked to be substituted as a petitioner. Thus, wherever "petitioners" are referred to in the Petition, they are understood to be Charles E. Oxley and Catherine E. Ellison, as personal representative of the late Fred J. Ellison.

WINFORD KENT BISHOP

BY: 

W. Kent Bishop, as
Attorney at Law and
Attorney-in-Fact for
Catherine E. Ellison

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To the Honorable Justices of the Supreme Court of the United States: Greetings

Charles Oxley and Fred Ellison, jointly and severally, pray for a writ of certiorari to review the per curiam judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The Fourth Circuit's judgment was entered April 11, 1978, is unreported and reproduced in Appendix B. The order denying a petition for rehearing was entered June 1, 1978, is unreported and reproduced in Appendix A. The findings of fact, conclusions of law and order of the District Court which were affirmed by the Fourth Circuit, are unreported and are reproduced in Appendix C. The latter decision (per Copenhaver) was entered pursuant to a January 15, 1976 District Court order of remand (per

Knapp) which is unreported and reproduced as Appendix D. The District Court order of remand was directed to an order of September 10, 1975 of a bankruptcy judge (Copenhaver) which is unreported and reproduced as Appendix E.[1/]

Jurisdiction

The jurisdiction of this Court rests on 28 U. S. C. §1254(1). The judgment of the Court of Appeals was dated and entered April 11, 1978, and the Court denied the petition for rehearing in an undated order entered June 1, 1978.

1/ Between January 15, 1976, the date of the district court order of remand, and December 21, 1976, the first day of remanded hearings, the bankruptcy judge, Copenhaver, was confirmed as district judge. He sat and entered decision pursuant to the order of remand. When Oxley and Ellison appealed to the district court from his January 24, 1977 decision, respondents objected by motion. Whereupon, he ruled that appeal lay to the Court of Appeals. It should be noted that the referee in bankrutpcy throughout was also Copenhaver.

Questions Presented

1. (A) Were Charles Oxley and Fred Ellison entitled to notice of and an opportunity to be heard on a modification of a Chapter XI plan of arrangement where as creditors of the debtor-in-possession they were materially and adversely affected thereby?

(B) In not ruling in their favor, did not the Courts below (i) disregard a conflicting decision of this Honorable Court and two other Courts of Appeal, (ii) fail to apply the Due Process clause of the Fifth Amendment of the United States Constitution; and (iii) misapply applicable provisions of the Bankruptcy Act (cognates of which are found in Chapters VIII (§77) and X and the Bankruptcy Rules of Practice)?

2. (A) Were Charles Oxley and Fred Ellison barred by the doctrine of laches in August, 1975 from raising issues of notice and opportunity to be heard in

May, 1970 when (i) they did not know about the Chapter XI modification until February, 1973, and (ii) until then, they had been engaged (successfully) in defending against lawsuits which they did not know were authorized by the modification?

(B) In ruling that they were barred, did not the Courts below (i) disregard a conflicting decision of this Court, and (ii) fail to apply the due process clause of the Fifth Amendment?

3. (A) Were Charles Oxley and Fred Ellison barred by the doctrine of unclean hands in August, 1975 from raising issues of notice and opportunity to be heard in May, 1970 because (i) they had become in the meantime state court judgment debtors for $50,000.00 each as a result of lawsuits sanctioned by the modification to the plan of arrangement;

(ii) the judgments were unpaid; (iii) the judgments held that they had deceived the West Virginia Securities Commissioner and the public at large;[2/] and (iv) subsequently, their efforts in state court to set aside those judgments for the fraud practiced on them had been unsuccessful?

(B) In ruling that they were barred, did not the courts below sub silencio (i) fail to apply a decision of this Court conflicting in principle with the decisions below and (ii) misapply the doctrines of federalism and comity and res judicata?

4. (A) Were Charles Oxley and Fred Ellison barred by the doctrines of comity and federalism, and res judicata, in August 1975 from raising issues of

2/ By former counsel they failed to defend in state court on the grounds they were defrauded on the stock subscriptions; the entire case was decided on cross motions for summary judgment addressed to the effect upon the subscription of a contemporaneous note.

notice and opportunity to be heard in May, 1970 because the effect of persuading the creditor body to reject the modification to the Chapter XI plan of arrangement might be to transform a judgment of the highest court of a State into an advisory opinion or produce a federal-state conflict?

(B) In ruling that they were barred, did not the courts below incorrectly apply sub silencio decisions of this Court conflicting in principle with the decisions below?

Constitutional Provision and Statutes Involved

The Constitutional provision which the case involves is the Due Process Clause of the Fifth Amendment to the United States Constitution:

> [N]or shall any person... be deprived of life, liberty or property, without due process of law....

The statutes involved are the Bankruptcy Act, Sections 1(11), 2a(8)

63(4), (8), (9), 58a, 302, 308, 313(1), 315, 334, 335(3), 353, 355, 361, 363, 364, 365, 366, 367(1) and 371. These statutes are reproduced in Appendix F. Cognate statutes involved are Bankruptcy Act Sections 77c(4), (8), 196, 222 and 224; and cognate Bankruptcy Rules of Practice involved include Rules 11-39 and 10-306.[2A/]

Statement of the Case

On March 26, 1970 an involuntary petition in bankruptcy was filed against Little Switzerland Brewing Company, a West Virginia corporation, in the United States District Court for the Southern District of West Virginia. Charles Oxley, an inactive vice president until February 28, 1970 when the president resigned, was then serving as acting president, and Oxley continued to render services to the

2A/ The volume and page where they may be found in the official edition are cited in Table of Contents supra at p. v.

company in an effort to persuade Herbert Singerman, president of August Wagner Breweries, Inc. in Columbus, Ohio to become chief executive officer of Little Switzerland, to inject working capital into the company and to lend his expertise and reputation to rehabilitate the company.

Mr. Oxley's services resulted in an agreement dated April 8, 1970 between Singerman, on the one hand, and the ten-member board of directors (including Oxley and Mr. Ellison), on the other hand. The agreement gave Singerman absolute control of the bankrupt, a condition precedent demanded by him and his attorneys prior to becoming chief executive officer, etc. Absolute control was assured in four ways: (1) Of the 1,850,000 outstanding shares,[3/] 634,000 were transferred to Singerman outright;[3A/] (2) Singerman was

3/ 2,000,000 shares were authorized by the articles of incorporation.

3A/ Oxley and Ellison transferred certificates for 25,990 shares each to Singerman, leaving each possessed of 24,010 shares.

given an option to purchase an additional 500,000 shares of the bankrupt at any time; (3) 830,370 shares under subscription were cancelled;[4/] (4) the entire board of directors and officers agreed to resign on request. Singerman's option required the subscriptions' cancellation.[4A/]

On April 8, 1970 a meeting of Little Switzerland's board of directors was held and the board (a) approved the terms of the April 8th agreement, (b) ratified their earlier (March 24) cancellation

4/ Oxley and Ellison each had subscribed to 5,000 shares and certificates representing the shares had been issued by the Company. After a 9 for 1 stock dividend, additional certificates for 45,000 shares each were issued. The certificates were retained by the company from the date of the subscription (September 1969) to and through the dates of cancellation (March 24, April 8 and 15, 1970).

4A/ After substracting 634,000 shares from 1,850,000 outstanding, it is observed that 1,216,000 shares remain; but 183,480 of these were in the hands of third persons and 830,370 were committed to the subscribers, leaving only 202,150 for the Singerman option. Although another 150,000 of authorized shares were available, the total of 202,150 and 150,000, or 352,150, plus the 634,000 would not give Singerman but 986,150 shares out of 2,000,000 or less than absolute control.

of the stock subscriptions, (c) granted Singerman the 500,000 share option, and (d) authorized two lawyers to answer the involuntary petition and to file a Chapter XI petition to convert the involuntary bankruptcy proceeding into a Chapter XI proceeding for an arrangement. Also on April 8, 1970 the referee in bankruptcy allowed the company's answer to the involuntary petition to be filed.

On April 15, 1970, the bankrupt filed a Chapter XI petition which by order of the same date was allowed filed. The order provided that the company as debtor in possession

> "be and it hereby is authorized to retain and continue in its service such officers...as it deems necessary for the continued operation of its business and to pay when and as the same become due all wages and salaries accrued on and after March 26, 1970, as well as all wages and salaries which shall be earned from and after the date hereof (April 15, 1970). 5/ [DA 35 at 39; emphasis added.]

Also on April 15, 1970, a meeting of the Little Switzerland's shareholders was held which elected the Singerman slate of directors. A meeting of that board later in the day elected the Singerman slate of officers. Consequently, Charles Oxley's services as vice president, acting president and director were terminated on April 15, 1970. 6/ Mr. Ellison had resigned March 13, 1970 from the board. Neither was present at the April 15th meetings.

Between April 15 and May 1, 1970, the referee in bankruptcy saw the proposed (original) plan of arrangement, Article

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5/ References to "DA" are to the Deferred Appendix filed in the Court of Appeals. References to "DE" are to the Deferred Exhibits.

6/ Mr. Oxley's letter of resignation is dated May 18, 1970 with no explanation appearing in the record (or elsewhere, although all the letters of resignation are so dated).

VIII of which refers to the April 8th agreement between Singerman and the directors, as follows:

> "To further facilitate and to show its good faith and intentions to perform its obligations contained in this plan of arrangement, the Debtor informs the Court that by agreement dated April 8, 1970, Herbert Singerman of Detroit, Michigan became the president and majority stockholder of the debtor. [emphasis added.]
>
> "That Herbert Singerman is the President and sole stockholder of the August Wagner Breweries, Inc. of 605 South Front Street, Columbus, Ohio, Brewers of the ever popular 'richer, keener, Augstiner, one of America's two finest beers.'
>
> "That Herbert Singerman is experienced in the management and operation of breweries and the brewing business; and that he will utilize his experience and his best efforts to rejuvenate and revitalize the Debtor into a successful, profitable business." (DA 112)

On April 25, 1970, the bankrupt's schedules were filed but Oxley and Ellison were not listed as creditors (DA 72 at

73-84) nor as subscription debtors (DA 72 at 93).

The referee's notice of May 1, 1970 calling for a first meeting of creditors on May 11, 1970 was accompanied by a copy of the proposed (original) plan of arrangement. (DA 106 at 108) Neither Oxley nor Ellison received a copy of this notice.

On May 11, 1970 the creditors elected a creditors committee the attorney for which was respondent James W. St. Clair, who insisted without a request by any of the creditors, that the proposed (original) plan of arrangement be modified to include Article IX which authorized his law firm to bring suit on "delinquent stock subscriptions receivables."[6A/]

On May 21, 1970 an amended plan of arrangement so providing was submitted in the name of the Debtor.[6A/]

to the referee in bankruptcy who entered an order THAT DAY providing:

> "And the Court hereby finding that the modification of the plan of arrangement originally filed herein, as set forth in the amended plan of arrangement aforesaid, does not materially and adversely affect the interest of any creditor who has not in writing assented thereto, it is accordingly
>
> ORDERED that the acceptances filed herein of said original plan of arrangement, and they hereby are, deemed acceptances of said amended plan of arrangement." [DA 41; Emphasis added.]

Oxley and Ellison had not in writing or otherwise accepted the original plan of arrangement because they did not know about it. Also the original plan of arrangement had never been submitted to the old or new boards of directors (nor was the amended plan).

On May 22, 1970 the Referee in Bankruptcy confirmed the amended plan

of arrangement observing that:

> "due notice having been given by mail to all persons entitled thereto; and no one having appeared in opposition to the confirmation of said amended arrangement; and the creditors' committee and all other parties appearing at the hearing herein on May 21, 1970, having urged the confirmation of said amended arrangement*** [DA 42; emphasis added]

and opining that:

> and it further appearing and the court being satisfied that the provisions of said Chapter [XI] have been complied with; that said amended arrangement is for the best interests of the creditors of said debtor; that said amended arrangement is feasible *** [DA 42 at 43; emphasis added.]

and requiring that:

> And it further appearing that, at the hearing herein on May 21, 1970, Herbert Singerman, individually and as chief executive officer and sole stockholder of August Wagner Breweries, Inc. as an inducement to the court to confirm said amended arrangement, has agreed and represented to the court that all advances made or caused to be made by said

> Herbert Singerman and August Wagner Breweries, Inc. to the debtor...will, except as to proceeds derived from future sales of capital stock of the debtor, be subordinated*** [DA 42 at 43; emphasis added.]

In September, 1970, James W. St. Clair instituted lawsuits in the state courts of West Virginia in the name of Little Switzerland against Charles Oxley and Fred Ellison for $50,000.00 each on the stock subscriptions signed in September, 1969.[6B/] Oxley and Ellison prevailed in the

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6B/ It might be pointed out that in October, 1968 Oxley and Ellison guaranteed obligations of the company as required by the Small Business Administration. In February, 1972 the United States sued Oxley and Ellison on the guarantees. They are defending on the ground that Small Business Administration's foreclosure sale was so sloppy that the security was impaired and the guarantors all discharged.

lower courts in 1971 on cross motions for summary judgment. St. Clair petitioned for appeal to the Supreme Court of Appeals of West Virginia; which was granted in 1972 after Little Switzerland had been subjected to the ignominy of (a) Singerman's walking away from the debtor and the confirmed plan of arrangement in December, 1970; (b) "one of the sloppiest foreclosure sales probably ever conducted in Cabell County;"[7/] (c) the forfeiture of its corporate charter on June 19, 1972 in an action by the State of West Virginia.[8/] After allowing the appeal, the Supreme Court of Appeals of West Virginia on June 25, 1973 reversed holding Oxley and Ellison liable on the stock subscriptions.[9/]

7/ Decision Order of the Circuit Court of Cabell County, entered May 23, 1977 in Fred Ellison v. Twentieth Street Bank, et al, at pp. 16 and 17, petition for appeal being denied by an evenly divided court on May 15, 1978 but which denied recovery because of Ellison's laches and unclean hands on account of
(continued on next page)
8/ and 9/ on next page.

Pursuant to mandate, lower state court orders were entered in September and November, 1973 against Oxley and Ellison, respectively, for a total of $100,000.00 ($50,000.00 each) plus interest, etc.

Oxley and Ellison then hired present counsel who in February and March, 1974 (after St. Clair filed suit in Georgia against Oxley-who had moved there in 1972-to enforce the West Virginia $50,000.00 judgment) filed motions in the respective West Virginia lower courts to set aside the mandated judgments for

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7/ continued from previous page the judgment of the Supreme Court of Appeals referred to below.

8/ State of West Virginia v. ABC Movers, Inc., et al, Civil Action No. 11333, Circuit Court of Kanawha County, West Virginia

9/ Little Switzerland Brewing Co. v. Oxley, et al., 197 S. E. 2d 301 (W. Va. 1973).

newly discovered evidence, other reasons justifying relief, etc. In June, 1974 on a related petition to the West Virginia Supreme Court of Appeals, a justice told counsel for Oxley and Ellison that the pernicious act was that of the United States Bankruptcy Court, not the state courts, and relief should be sought there.

After the motion to set aside was denied in 1975,[10/] Oxley and Ellison filed their application in the United States District Court for the Southern District of West Virginia on August 18, 1975 to reopen the Chapter XI proceedings under Section 2a(8) of the Bankruptcy Act.

ARGUMENT WHY PETITION SHOULD BE GRANTED

I. The Fourth Circuit has decided federal questions (Questions No. 1, notice, and 2, laches, supra at pp. 4-6) in a way in conflict with an applicable decision of this Court, to-wit: City of New York v. New York, New Haven & Hartford Railroad Co., 344 U. S. 293 (1953).

10/ on Page 24 infra.

Prior to January 15, 1930, The City of New York made various assessments for local improvements against specific property of the railroad which under state law became liens in rem against the property. In October, 1935 the railroad filed a petition for reorganization under Chapter VIII, Section 77 of the Bankruptcy Act.

In January, 1936 a bar order was entered by the district court and the City did not file a claim. Eleven years later, in September, 1947 an order and final decree were entered on the plan of reorganization. In August, 1951, the railroad brought an action to declare the liens void. The district court held the liens were barred. 105 F. Supp. 413 (D. Conn. 1951). The Court of Appeals for the Second Circuit affirmed, Judge Frank dissenting. 197 F.2d 428 (2d Cir. 1952). This Honorable

Court granted certiorari and reversed.

This Court's reversal was based on Sections 77c (8) and 77c (4) of Chapter VIII quoted in the opinion as follows:

> "The judge shall cause reasonable notice of the period in which claims may be filed... by publication or otherwise. 11 U.S.C. §205(c)(8). " [344 U. S. at 296.]
>
> "The judge shall require..." proper persons to file in the court a list of all known creditors, the amount and character of their claims and their last known post office addresses. 11 U. S. C. §205(c) (4). [344 U. S. at 296.]

These statutes are very similar to the constellation of provisions in Chapter XI of the same act protecting Charles Oxley and Fred Ellison, to-wit:

Section 58a of the Bankrutpcy Act provides that

> Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of ... (2) all hearings upon applications for the confirmation of arrangements ...(3) all meetings of creditors*** [Emphasis added.]

and this section is made applicable to Chapter XI proceedings by Section 302 which states in part:

> For the purposes of such application [of provisions of chapters I to VII to Chapter XI provisions relating to "bankrupts" shall be deemed to relate also to "debtors"...

Chapter XI specifically contains the following relevant provisions:

> Whenever notice is to be given under this Chapter [XI], the court shall designate... the persons to whom, and the form and manner in which the notice shall be given. *** [Section 315; Emphasis added.]

> Not less than twenty-five nor more than forty days after the [Chapter XI] petition is filed the court shall hold a first meeting of creditors. [Section 334; Emphasis added.]

> The notice of such [first] meeting of creditors...may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation. [Section 335(3). Creditors... shall file their proofs of claim before confirmation except as follows: *** (2) A claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct. [Section 355; emphasis added.]

On the basis of Sections 77 c (8) and 77 c (4) the Supreme Court held that:

> The statutory command for notice embodies a basic principle of justice--that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. [344 U. S. at 297]

and also

> But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. [344 U. S. at 297]

This Supreme Court decision is controlling here not only because the statutes there

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10/ continued from Page 20.
In Cabell County only; no order has been entered in Mercer County on Ellison's motion to set aside the $50,000.00 judgment.

construed are very similar to those here applicable, but also because Oxley and Ellison were, like the City of New York, creditors, as defined in Section 1(11).

Oxley was a creditor of Little Switzerland on May 1, 1970 (the date of Notice to creditors), on May 21, 1970 (the date of filing the modification of the proposed (original) plan of arrangement), and May 22, 1970, (the date of confirmation of the amended plan of arrangement), because (a) he rendered services to the company from March 26, 1970 to April 15, 1970; (b) the company by the April 15, 1970 order of the referee in bankruptcy was authorized to pay him as an officer a wage or salary for his labor. See Sections 63b.

Ellison was also a creditor on May 1 and 21 (when the modification was filed) because (a) he possessed a contingent

claim against the debtor under Section 63a(8) and (b) he possessed a claim for anticipatory breach of contract, executory in whole or part under Section 63a(9).

Ellison's contingent claim was to stock certificates to the 5,000 shares to which he had subscribed in September, 1969 and to the additional 45,000 shares resulting from the 9 for 1 stock dividend later in 1969. The stock certificates actually existed. The claim was contingent because (a) his subscription had been cancelled by the board of directors and ratified by the shareholders while the company was insolvent, (b) but under West Virginia's trust fund doctrine such subscriptions can be enforced by creditors notwithstanding cancellation, (c) and the company was not rendered even arguably solvent until May 22, 1970 when the

modification was found to be "feasible" by the referee in bankruptcy and confirmed, which action arguably revalidated the earlier cancellation by corporate action and made the cancellations effective.

Ellison's claim for anticipatory breach of contract arises because (a) on April 8, 1970 the board authorized a 500,000 stock option to Herbert Singerman which the board had power to authorize and which would make ultra vires any transmittal to him by the board of Ellison's stock certificates whether or not paid for by him, and (b) on April 15, 1970 the referee in bankruptcy was appraised of the April 8th agreement including the 500,000 share option, and approved it in allowing the original plan to be filed, and (c) on May 22, 1970 confirmed the modified plan which was found to be feasible

because of Herbert Singerman's injection of $89,000.00 of working capital into the company which itself was secured because Singerman was assured of control of the company.

By the same reasoning, Oxley had a contingent claim and a claim for anticipatory breach.

Oxley and Ellison were "materially and adversely affected" as creditors, as follows[10A]:

(1) Oxley had no opportunity to file a proof of claim for services rendered to the corporation for the benefit of the estate from March 26, 1970 to April 15, 1970;

(2) Oxley and Ellison had no opportunity to show the creditor body that Herbert Singerman's willingness to become chief executive officer of the company and to inject at least $89,000 of working capital into the company was conditioned on the cancellation of all stock subscriptions, including Oxley's and Ellison's, in order to assure himself of absolute control while absent from the State (his home was in Mich.)[10];

10A/ Sections 308 and 364, Bankruptcy Act. See cognate under Chapter X, to-wit: Section 222.

10B/ Located on P. 28B

(3) They had no opportunity to show the creditors the contradiction between the actions of referee Copenhaver in approving the April 8, 1970 agreement between Singerman and the ten-member board of directors which recorded the quid pro quo for the successful conversion to Chapter XI from the involuntary bankrutpcy proceedings, while at the same time authorizing suits against Oxley and Ellison;

(4) They had no opportunity to show the creditors that their subscriptions were not reflected in any of Little Switzerland's financial statements until February 27, 1970 (being year-end statements for 1969) and on the next day, February 28, 1970, the creditors who attended a pre-bankruptcy creditors' meeting were informed the company was insolvent. Hence, there were no creditors who actually relied on the subscriptions in extending credit to Little Switzerland from the date of subscription (September 1969) to the date of notice (February 28, 1970);

(5) They had no opportunity to show the creditors that they could not receive the certificates themselves when they tendered the purchase price because that part of the bargain had been made impossible because of the 500,000 share option granted to Singerman after the subscriptions were cancelled. 10C/

II. The Fourth Circuit has rendered a decision (re: Question No. 1 Notice) in conflict with decisions of the First and Third Circuits on the same matter, to-wit: In re Intaco Puerto Rico, Inc., 494 F.2d 94 (1st Cir. 1974) and In re Harbor Tank Storage Co., 385 F.2d 111 (3rd Cir. 1967).

The Fourth Circuit judgment below concerns Chapter XI of the Bankruptcy Act. Recent judgments of the First and Third Circuits (citation supra) concerning Chapter X of the Bankruptcy Act are on the same matter and in conflict with the judgment below. As authority for the

10B/ The April 8, 1970 agreement and the cancellations on March 24 and April 8 specified "except as may affect the rights of third persons".

10C/See footnote 4A supra.

proposition of sameness, the Third Circuit said on the question of applicability of City of New York v. New York, N. H. & H. R. R. Co., 344 U. S. 293 (1953, which concerned Chapter VIII, Sec. 77 of the Bankruptcy Act) to that Chapter X case:

> [T]he essential issue--what is the effect of the failure to give notice to a known creditor--is identical to both cases, and there is nothing in the language or structure of Chapter X to suggest that a different result should be reached. [In Re Harbor Tank Storage Co., (3rd Cir. 1967) 385 F.2d 111 at 116; emphasis added]

If the notice provisions of Chapter VIII, Section 77 of the Bankruptcy Act are substantively identical to those of Chapter X (being Sections 196 and 224(1)), there is no less reason for substantive identity between the notice provisions of Chapter VIII, Section 77 and Chapter X, on the one hand, and Chapter XI, on the other hand. See the analysis above

under Argument I, at pages , supra.

III. The Fourth Circuit has decided a federal question (Question No. 3. unclean hands) in a way conflicting in principle with an applicable decision of this Court, to-wit: Toomer v. Witsell, 334 U. S. 385 (1947).

In Toomer v. Witsell, supra, a group of fish dealers attempted to enjoin as unconstitutional under the United States Constitution certain South Carolina statutes imposing requirements on non-residents as a condition of being permitted to take shrimp during the open season in the coastal waters of the State. This Court held that the fact that several of the appellants had been convicted of shrimping out of season in prohibited inland waters did not call for the application of the clean hands maxim due to the fact that this previous misconduct did not have sufficient relationship to the

constitutionality of the challenged statutes.

By way of contrast, in Keystone Driller Company v. General Excavator Company, 290 U. S. 240, 78 L. ed. 293, 54 S. Ct. 682 (1933), the petitioner had sued to protect patents on various digging equipment which it allegedly owned from infringement. In the course of the proceedings it was discovered that petitioner, in a prior proceeding concerning the very same patents, had corrupted a witness who knew of the prior use of the patents, procured the concealment of evidence, and obtained a decree sustaining the validity of said patents. The petitioner had attempted to use this prior decree in the suit at bar.

This Court held that the petitioner

was not entitled to relief due to its unclean hands resulting from its actions in the prior lawsuit. Of utmost importance is the "relationship test" posited by the Court. Mr. Justice Butler for the Court stated that:

> "They (courts of equity) apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect to the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication."
>
> 290 U. S. at 245, 78 L. ed. at 297; 54 S. Ct. at 684 [Emphasis added].

West Virginia law is like Toomer v. Witsell. Ihrig. v. Ihrig, 88 S. E. 1010

(W. Va. 1917); Peters v. Case, 62 W. Va. 33, 57 S. E. 733 (1907); Bias v. Bias, 109 W. Va. 621, 155 S. E. 898 (1932); Highland v. Davis, 119 W. Va. 501, 195 S. E. 604 (1937).

Another consideration is whether Younger, Huffman, Juidice and Trainor[16/] mandate that the Courts below bar petitioner's claims because of the application of a collateral estoppel on the issue of unclean hands on account of the decision of the West Virginia Supreme Court of Appeals. This issue is discussed next.

IV. The Fourth Circuit has decided federal questions (Questions No. 4, comity, federalism and res judicata, and No. 3, unclean hands) in a way conflicting in principle with applicable decisions of this Court, to-wit: Younger, Huffman, Juidice, and Trainor. 17/

16/ Younger v. Harris, 401 U. S. 37 (197); Huffman v. Pursue, Ltd. 420 U. S. 592 (197); Juidice v. Vail, 430 U. S. 327 Trainor v. Hernandez, 431 U. S. 444 (1977).

17/ See footnote 16, supra.

The significance of the reported decision of the Supreme Court of Appeals of West Virginia upon the Fourth Circuit is not disclosed in its per curiam judgment. Appendix B. The judgment does incorporate the two opinions of Copenhaver, the first as bankruptcy judge (Appendix E) and the second as district judge (Appendix C). The "Introduction" to the latter decision, states:

> In connection [with the application to reopen, to vacate the order of confirmation and to revoke the amended plan of arrangement], the applicants seek related relief, the thrust of which would relieve the applicants from $50,000.00 judgments rendered against each of them in the state courts of West Virginia in 1973 upon their separate unpaid subscriptions for shares of [Little Switzerland]. [Appendix C-1A emphasis added.]

The decision applies the doctrine of res judicata to the applicants' motives for subscribing to the shares of the company

(Appendix C -), because the only evidence adduced at the remanded hearing on the application to reopen was that both were advised by a respected local attorney that the subscription and close-out and stock dividend were lawful.[18/] The district court opinion observes:

> The fraud issues that applicants would now undertake to present in this court, consisting of common law fraud and violations of federal and state securities laws, are issues that ought to have been presented in the state court proceedings and are governed by the doctrine of res judicata. [Appendix C - 44,5]

This is an erroneous conclusion of law for (a) the suits although nominally in the name of Little Switzerland as plaintiff were actions brought by St. Clair as Special Counsel under Article IX of the Amended Plan of Arrangement and therefore actions by and for the benefit of pre-bankruptcy creditors of the company, and (b) the trust

18/ DA 652-4, 550, 546-547.

fund doctrine in effect in West Virginia does not allow a defense against the corporation to be set up against innocent creditors of the corporation.[19/]

Moreover, they could not defend by showing that the mofified Chapter XI plan of arrangement was invalid for the referee's failure to give them notice or opportunity to be heard because of the lack of jurisdiction in the state courts to determine the invalidity of the amended plan of arrangement. (See Copenhaver at Appendix C-53.)

While Oxley and Ellison had patently unpersuasive state defenses of (a) Little Switzerland was not insolvent on March 24 or April 8, 1970 when the subscriptions were cancelled or (b) that Little Switzerland's shareholders ratified the cancellations after the company became solvent (e.g. at the August 7, 1970 meeting), they were hindered impermissably in their defense; and therefore, the doctrine of comity and federalism as defined in Younger,

19/ Stalnaker v. Gum, 104 S. E. 730 (W. Va. 1920) (obiter dictum).

Huffman, Juidice and Trainor and the related doctrine of state-to-federal res judicata are not applicable.

Perhaps, the Courts below extended no relief to Charles Oxley and Fred Ellison because a possible result of reopening the Chapter XI proceedings and vacating the order of confirmation would be that they could persuade the other creditors that Article IX should be deleted from the amended plan of arrangement. It would seem that such creditor action would forever bar future lawsuits against them on the subscriptions; but the effect on the reported and unanimous decision of the West Virginia Supreme Court of Appeals is problematical.

Would such creditor action bar enforcement in the state courts of West Virginia of the decision of that court's highest

tribunal? The answer would seem to be, No. A petition for appeal to the upper state court could be denied or, if granted, enforcement could be permitted under the state's trust fund doctrine resulting in a state sheriff levying execution on Oxley and Ellison for the benefit of creditors contrary to a vote of the creditors of Little Switzerland at the new confirmation hearing on the plan of arrangement. This would seem to present a clear conflict between West Virginia's trust fund doctrine and federal law pertaining to rights of creditors under Chapter XI plans of arrangement.[21/]

Therefore, it may be that the Court's below denied the application to reopen because of the possible embarrassment of a federal-state conflict. While an effective answer would seem to be that the creditors might reaffirm Article IX

21/ Creditor disapprobation of Article IX could stop enforcement of the decision of West Virginia Supreme Court. This would render the decision into an advisory opinion contrary to the West Virginia Constitition.

and the foregoing speculation is entitled to no weight, a true answer is that the individual rights of Oxley and Ellison to notice and an opportunity to be heard are more important than embarrassment, conflict or federal-state relations. At any rate the issue of what weight should be accorded to the existence and substance of the West Virginia decision, in light of the referee's (Copenhaver) failure to give Oxley and Ellison notice of Article IX is an important federal question which this Court has not, but should, settle.

CONCLUSION

This petition should be granted because no principle is more essential to a government of laws than an opportunity to be heard prior to an injury receiving the imprimatur of government. Notice is a condition precedent to opportunity and therefore rises to the same level. No person's prior conduct disables him from this protection. Nor do possible frictions within the federal system negate the Constitutional mandate.

Respectfully submitted,

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